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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1934

No. 164

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, PETITIONER,

vs.

A. ROBINSON, ADMINISTRATOR OF BENJAMIN Y. COOLEY, DECEASED, RESPONDENT.

BRIEF FOR RESPONDENT.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1934

No. 154

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, PETITIONER,

*vs.*

E. E. JOHNSON, ADMINISTRATOR OF BENJAMIN F. COOKSEY, DECEASED, RESPONDENT.

## BRIEF FOR RESPONDENT.

### I. JURISDICTION

Respondent does not question the jurisdiction of this court to review the judgment of the Circuit Court of Appeals.

He denies, however, that the cases of *Bergholm* vs. *Peoria Life Insurance Company*, 284 U. S. 489, 76 L. Ed. 416, or *Egan* vs. *New York Life Insurance Company*, 67 F. 2d, 899, justify a reversal of the judgment of the Circuit Court of Appeals.

### II. STATEMENT OF THE CASE

The petitioner issued its policy of insurance to respondent's intestate on May 16, 1930. The premiums specified in said policy were payable quarterly in advance with a 31 day grace clause. The last premium paid was that of August 16, 1931, and kept the policy in full force and effect until November 16, 1931, and thirty-one days thereafter, December 17, 1931. See sec. 12 of policy.

In the face of the policy which is not copied nor printed

in the record, but under Stipulation 7 (R. p. 80) is certified as a part of the record, the Company agreed:

First, to pay the insured's beneficiary $4,500.00 *upon receipt of due proof of the death*, and,

Second, "If the insured is totally and presumably permanently disabled before age sixty, will pay him $45.00 monthly during such disability besides waiving premium payments, *all upon the conditions set forth in Section 3.*"

There was no Section 3 on the face of the policy itself. There was attached to the policy a printed form containing numerous superadded conditions. See pp. 2 and 3 of the policy.

Section 3 of these superadded conditions provided:

"If before attaining the age of sixty years and while no premium on this policy *is in default* the insured shall furnish to the company due proof that he is totally disabled, the company will grant the following benefits during the remaining lifetime of the insured so long as such disability continues";

and Section (b) thereof provided:

"The company will also, after receipt of such due proof, waive payment of each premium as it thereafter becomes due during such disability."

There was also attached to the policy a rider providing among other things under the title:

"Benefits if *proof delayed* and *no premium in default*":

"If, while *no* premium is in default, the proof furnished the company . . . is such as to entitle the insured to the disability benefits . . ., and if due proof is also furnished the company that such disability has been continuous since its beginning, the company will:

"(a) Begin the monthly income payments provided for in such section as of the end of the first completed month of such disability if earlier than the date of receipt of

such proof, instead of as of the date of receipt of such proof; and

"(b) Return any premium due after the beginning of such disability which has been paid during the continuance thereof."

And under the heading

"Benefits if Premium in Default not over Six Months":

"If, not later than six months after the due date of any premium in default, and provided no previously due premium is also in default, due proof *is received* by the Company before the insured shall have attained the age of sixty years, that the insured was totally and permanently disabled . . . *at the date when such premium* in *default fell due*, and has been continuously so disabled since said *due date*, the policy will be reinstated without evidence of insurability and the waiver of premium and disability income benefit shall be the same as if such default had not occurred."

The insured became ill and totally disabled both physically and mentally, not only from engaging in any gainful enterprise, but also from preparing, executing and forwarding to the defendant any proofs of his disability before December 17, 1931, the day another premium fell due. This disability continued until his death, intestate, which occurred on or about January 20, 1932. The insured, if he had lived, would have had until June 17, 1932, to have filed proofs of disability and be entitled to the full protection of the policy without the payment of another cent, because no "*previously due premium*" was in default. This clause is wholly inconsistent with any theory that this policy became absolutely void on December 17th merely by reason of the *non-profer* of proof before that day, even if he were capable of furnishing them then.

In addition to this and in the interval between December 15th and his death, during the lifetime of Mr. Cooksey and within the six months period contemplated under the benefit

rider just mentioned, a certain Mr. Brown, the agent for the insurance company who had sold the policy, collected the premiums and prepared certain extension notes as to premiums previously maturing, told Mr. Johnson, the nephew of the deceased and who later qualified as administrator and is the respondent "that if Mr. Cooksey was totally disabled before the thirty-one days was out, that the company would pay the policy if anything happened" (see R. pp. 44-51), and a like statement was made to the insured's widow (R. p. 47).

The Company itself in substance made a like statement to the respondent in writing on February 16, 1933, after Mr. Cooksey's death (R. p. 30).

The Company was given formal notice of the death of Mr. Cooksey under date January 27, 1932 (see R. p. 26).

On February 16, 1932, the Company declined liability under the policy on the sole ground, as stated in their letter (R. p. 30) that "according to our office records this policy lapsed for the non-payment of the premium due November 15, 1931", and after quoting at length the above provisions of the policy under the heading "Supplementary Benefits to Section Entitled 'Benefits in Event of Total and Permanent Disability before age 60' "—the provision containing the six months default provision above recited, concluded:

> "As this policy lapsed *prior to the date Mr. Cooksey became disabled,* there is nothing to be considered." (R. p. 30).

It is now conceded that the policy did not lapse prior to that date. Yet the company denies liability but on other grounds. In consequence of this the plaintiff, who had in the meantime qualified as administrator of the decedent, filed his motion for judgment in the Circuit Court of Rappahannock County, Virginia, (R. pp. 1 to 4), which was later removed to the U. S. District Court for the Western District of Virginia on the ground of diverse citizenship.

Thereafter the notice of motion was amended in certain particulars; the Company demurred; the demurrer was over-

ruled, and the defendant Company filed its grounds of defense denying the existence of the contract as alleged and specified its grounds of defense (R. p. 18). Issue was joined on these pleadings and the case was tried at Lynchburg, Virginia, on June 16th and 17th, 1933, to a jury.

At the termination of the plaintiff's evidence the court, on motion of the defendant, directed a verdict for defendant. To this ruling of the court the plaintiff excepted, and moved the court to set aside the verdict as contrary to the law and the evidence, (R. p. 22), which motion was also overruled. The plaintiff again excepted and final judgment was entered in favor of the defendant. From this judgment a writ of error was perfected to the Circuit Court of Appeals, Fourth Circuit. The assignments of error there were as follows (R. p. 23):

> 1. That the court erred in holding there was no issue of fact material for determination;
> 2. That the court erred in directing a verdict in favor of the defendant; and
> 3. That the court erred in refusing to sustain the motion to set aside the verdict.

In the Circuit Court of Appeals it was urged under these assignments—

(a) That the coverage of the policy in its entirety was in full force and effect at least until December 17, 1931, and that there had been no breach of condition, under *McMaster* vs. *New York Life Insurance Company*, 183 U. S. 25, 46 L. Ed. 64;

(b) That if any breach of condition thereafter arose, it resulted not from the non-payment of premiums but from the failure to furnish proofs; and under the provisions of the Virginia statute Section 4228, the company could make no defense on any ground other than the non-payment of premiums, the policy having been in force more than one year. This Section, so far as applicable, reads as follows:

> "Sec. 4228. Suicide or death by legal execution; when policy incontestable; exception.—In any action, motion or other proceeding on a policy of life insurance

hereafter issued to any person residing in this State at the time of issuance thereof, or which is otherwise subject to the laws of this State, to recover for the death of such person, it shall be no defense that the insured committed suicide, . . . Nor shall such policy be contestable for any cause after it shall have been in force *during the lifetime of the insured* for one year from its date, except for non-payment of premiums. . . ."

(c) That the superadded conditions of the policy relied on to defeat the policy were void under the provisions of Sections 4315 and 4317 of the Virginia Code which, so far as applicable, read as follows:

> 4315. "No policy of insurance against loss or damage from disease . . . shall be issued or delivered in this state . . . unless the *exceptions be printed with the same prominence as the benefits to which such exceptions apply*; nor unless it contains in substance the following provisions: . . .
>
> > (i) A provision that no such policy shall limit the time within which proofs of claims shall be furnished to the company to a period less than ninety days from the *date of death* . . . or *from the termination of any other disability*".
>
> 4317. "No company or agent shall issue or deliver in this state any policy which conflicts with any provision of the two preceding sections. A policy issued in violation of the same shall be held valid and shall be construed as provided in the said sections, and when any provision in a policy is in conflict with any provision of the said sections, the rights, duties and obligations of the company and policy holder and the beneficiary shall be governed by the provisions of the said sections."

(d) That the policy did not require proof of disability as a condition precedent to a waiver of the premiums; and if it did, that the mental and physical inability of the insured to do so excused the furnishing of such proof, and that there was ample evidence in the record to submit these questions to the jury.

The Circuit Court of Appeals in its opinion (R. p. 83) overruled the proposition (a) of respondent and failed to pass on (b) or (c), and in respect to (d) held that such disability, if it existed, did excuse proofs; that there was ample evidence to justify submitting that question to the jury, and reversed the cause and remanded it for new trial. (See R. p. 90). To this judgment a writ of certiorari was issued by this court on petition of the Insurance Company.

## III. CONTENTIONS OF THE RESPONDENT

It is our contention that the Circuit Court of Appeals ruled erroneously on all of these questions except the last.

## IV. ARGUMENT

The petitioner in its brief, (p. 4) contends that

> "the sole question is whether the mental or physical incapacity of the insured excused the failure to furnish proofs of disability pending the death."

~~Petitioner~~ Respondent contends that under Section 240 of the Judicial Code as amended the case is here as under "unrestricted writ of error or appeal; and that under *Cole* vs. *Ralph*, 252 U. S. 286, 289-90, 64 L. Ed. 567, 574, and *Lutcher, etc. Co.* v. *Knight*, 217 U. S. 257, 267, 54 L. Ed. 757, 61; all of the questions presented to the Circuit Court of Appeals may properly be inquired into by this court and should be under the circumstances of this case.

In *Cole* vs. *Ralph*, 252 U. S. 286, at page 289-90, 64 L. Ed. 567, at page 574, in dealing with this question, this court said:

> "The defendant does not rely entirely upon the ground of decision advanced by the Circuit Court of Appeals, but urges at length that if it be not well taken the record discloses other grounds not considered by that court for reversing the judgment and ordering a new trial, and he further urges that if the decision of the Circuit Court of Appeals be right it is not sufficiently comprehensive to serve as a guide to the court or the parties upon another trial. . . . In the

circumstances it is open to us to deal only with the matter considered by the Circuit Court of Appeals and to remand the cases to it for any needed action upon other questions, or to proceed ourselves to a complete decision. The latter course seems the better inasmuch as counsel have united in presenting to us all questions thought to arise upon the record and the litigation already has covered a considerable period."

"The entire record is before us with power to decide the case as it was presented to the Circuit Court of Appeals by reason of the writ of error issued out of that court." *Lutcher and Moore Lumber Co.* vs. *Knight*, 217 U. S. 257, 267, 54 L. Ed. 757, 761. *Camp* vs. *Gress*, 250 U. S. 318, 63 L. Ed. 1004; *Meccan* vs. *Wannamaker*, 252 U. S. 242, 64 L. Ed. 827.

**(a) Physical Disability Fixed Liability for Premium Waiver**

Your petitioners therefore urge that in remanding this case for a new trial, the physical disability of the plaintiff to engage in a useful occupation prior to December 17, 1931, (the expiration date of the grace clause) as well as his mental and physical capacity to furnish proofs of loss at that time, should have been left open to inquiry by the jury because the occurrence of the disability and not the furnishing of proof fixed the liability of the insurer thereunder, and that the right of the petitioner to contest liability on any ground other than non-payment of premium should have been denied.

As already pointed out, the assumpsits of the company expressed *on the face of the policy* say not a word about proofs of disability as a condition precedent to payment of the policy or waiver of premiums, but mentions only *proof of death.* See face of policy where the assumpsit is, first, to pay the insured's beneficiary $4,500.00 upon *receipt of due proof of death*, and, second:

> "If the insured is totally and presumably permanently disabled before age 60, *will pay* him $45.00 monthly during such disability, *besides waiving premium payments*, all upon the conditions set forth in Section 3."

There is nothing said her at least about furnishing proofs as a condition *precedent* to liability under this policy. Proof

of death alone is mentioned, and the face of the policy shows that an additional premium was paid for the risks covered by the disability benefits.

It is true that Section 3 if it stood alone and was the *only assumpsit* in the policy, as was the case in the *Bergholm* case, supra, as well as the *Egan* case, could be construed to sustain the position of the petitioner and the conclusion of the Circuit Court of Appeals in respect thereto, but it *does not stand alone.* It is bound to be read in connection with the primary assumpsit of the policy and not to destroy it.

It must also be read in connection with the superadded provisions under the heading "Benefits if Premium in Default not over Six Months":

> "If, not later than *six months after the due date of any premium in default,* and provided no *previously* due premium is also in default, due proof is *received by the company* before the insured shall have attained the age of sixty years, that the insured *was* totally and permanently disabled at the date when such premium in default fell due, and has been continuously so disabled since said due date, the policy will be reinstated without evidence of insurability and the waiver of premium and disability income benefit shall be the same as if such default had not occurred."

Every stipulation in this clause has been complied with: Due proof was given on January 27th within one month after the supposed default, that insured had been continuously disabled since the due date, and no *previously due payment was in default.* The opinion of the Circuit Court of Appeals dealing with these contentions said that the language referred to on the face of the policy is immediately qualified by reference to "the conditions set forth in Section 3"; and of the provision in reference to default after six months, says that "the right of reinstatement is *obviously* not intended to survive the death of the insured"; that "the requirement of proof of disability before default contained in the disability benefits Section 3, is designed to afford the company an opportunity for investigation "during the life time of the insured

and thus protect itself against fraudulent claims *after death* that the insured had become totally and permanently disabled before the default occurred", and continues:

> "The requirement is relaxed by the supplemental provision *if during the life of the insured* due proof is received by the company that the insured was disabled when premium in default fell due."

The trouble with this line of argument is that it relies on assumptions, arguments and the addition of words not found in the policy to sustain the conclusions, and goes counter to all rules of construction applicable to contracts of insurance such as this. The policy does not "obviously" contemplate the continued life of the insured before proofs, nothing is said about opportunity to investigate during the life of insured, nor require proofs during the life of the insured or *by him.* On the contrary it only stipulates for "receipt of due proof", source not specified "not later than six months after due date."

Granted that the provision of clause 3 quoted if alone, and there was no other clause in the policy of assumption on the part of the insured, the conclusion of the court in respect to its effect standing alone might be correct; but when read in conjunction with the clear assumption for value to pay disability benefits and waive premiums in event of disability prior to age sixty, and the additional clause just quoted of additional benefits in event of delayed proof, all that we can get out of it is such conflicting provisions in the same policy as to raise an ambiguity and necessitate construction.

It is to be borne in mind here that protection against this very disability was clearly within the coverage of the policy and that a separate consideration was demanded and paid therefor; that the event against which it insured and for which the deceased had paid full value actually occurred, and that the insured was given six full months more to make proof, and that the insurer is here seeking to escape liability for failure to comply with a condition to be performed *subsequent to the happening of the event insured against.*

Italics supplied throughout except where otherwise stated.

In dealing with a similar question in *McMaster* vs. *New York Life Insurance Co.*, 183 U. S. 25, 46 L. Ed. 64, this court said:

> "We are dealing purely with the question of *forfeiture*, and the rule is that if policies of insurance contain inconsistent provisions, or are so framed as to be fairly open to construction, that view should be adopted if possible which will sustain rather than forfeit the contract."

And again, speaking of the contract there under consideration, which is identical in principle with the contract here, said:

> "As the contracts were *for life* and were not determinable . . . at a fixed date but *only by forfeiture*, it appears to us that the applicable rules of construction forbid the denial of the month of grace in whole or in part";

and then comments:

> "It is worthy of remark that it was specifically provided that after the policies had been in force one full year they should become incontestable on any other ground than *non-payment of premiums.*"

There is not only such a provision in this policy, but Section 4228 of the Virginia Code contains the mandatory provision to the same effect.

> "Nor shall such policy be contested for any cause after one year from the date except for nonpayment of premiums or the violation of the conditions of such policy requiring the payment of additional premium in the event of naval or military service in time of war."

It will be observed that this provision is not applicable to one feature of the policy only, but to the policy in its entirety.

Petitioner places great reliance on the *Bergholm* case, 284 U. S. 489, 76 L. Ed. 416. This is clearly distinguishable from the case at bar. We have taken the precaution to

examine the record of that case in this court with the following result: The face of the policy contained no provision for disability benefits or premium waiver at all. By superadded provisions only the one month grace provision and a conditional *disability clause* was added. The original assumpsit on the face of the policy was merely a promise to "pay $5,000.00 upon due proof of death . . . subject to the provisions of this policy." On the face of the policy there is no reference to disability whatsoever. In the unsigned addendum of Conditions the disability liability is changed from that on the face of the policy to read as follows:

> "Upon receipt by the Company of *satisfactory proof* that the insured is totally and permanently disabled as hereinafter defined, the company will—
>
> "1. Pay for the insured all premiums becoming due hereon after receipt of such proof and during the continuance of the total and permanent disability . . . to entitle the insured to the above total and permanent disability benefits such policy at the time of making claim for such benefits must be *in full force and all premiums becoming due prior to the time of making claim must have been duly paid by the insured.*"

It is thus clear that the conditions comprising the only assumptions in the policy in the *Bergholm* case are materially different from those here presented and free from the ambiguity here present. It was in regard to this that the Circuit Court of Appeals in the *Bergholm* case said "explicit language of that provision *negatives* the conclusion that the appellant consented that the fact of the insured becoming totally and permanently disabled as defined in that provision should have the effect of keeping the policy in force without the payment of the stipulated premiums." 50 Fed. 2d 67.

The langugage of the policy which was passed on in *Minnesota M. L. I. Co.* vs. *Marshall*, 29 Fed. (2) 977, certiorari refused 279 U. S. 85, 76 L. Ed. 416, is in import and legal effect substantially identical with the policy here in question. That policy was dated October 14th. Premiums were due on October 14th of each year. The second premium due October

14, 1926, was not paid during the grace period. The insured died November 29, 1926, fifteen days after the expiration of the grace period as the result of an appendix operation on November 16th, also beyond the grace period, but the evidence showed that he had suffered from this appendicitis for several days prior thereto and had been disabled, not mentally, but physically. The Circuit Court of Appeals at page 977, said:

> "Did the provisions of the policy require a waiver of the payment of the premium which became due October 14, 1925, simply because the insured became totally and permanently disabled during the grace period?"
>
> "The policy provided that if the insured while the policy is in full force and effect and without default in the payment of the premiums shall become totally and permanently disabled as hereinafter provided, *and shall furnish satisfactory proof thereof*, the company will waive the payment of premiums thereafter becoming due . . .; 2nd, *upon the receipt of due proof of total and permanent disability as above defined* the company will waive the benefits of all premiums *thereafter becoming due.*

Compare this provision with the provision in the face of the policy and it parallels it in all essential particulars, except that nothing is said here as to proof of disability as a condition of the disability benefits.

> "If the insured is totally and presumably permanently disabled before age sixty, will pay to the insured $45.00 monthly during such disability besides waiving premium payments, all upon the conditions set forth in Section 3."

The *Marshall* case, discussing the language first above quoted, said:

> "On the question of when the time of waiver of the payment of premiums begins under policy provisions similar to those quoted there are two lines of decision; one holding that proof of disability fixes the time when the waiver begins; and the other holding

that the time of waiver is the time of disability, and that a reasonable time thereafter is allowed to make proof of such disability, and that if death occurs before the proof of disability is made, although after the due date of the premium, the insurance company is liable, where the disability arises before the due date of the premium, and continues until death."

That court then held it was unnecessary to distinguish the language of the policies upon which these opinions are based, stating that they unquestionably put a different construction upon practically the same provisions of insurance policies, and adds:

"These decisions of *themselves establish doubt* as to the construction and meaning of the provisions which we are called upon to interpret. It is a familiar rule of construction that where contracts of insurance are prepared by the insurer and there is *doubt* as to the meaning of their provisions, it will be construed most favorably to the insured.

" 'It is said that compliance with this provision, *even though impossible*, was a condition *precedent* to the securing of insurance. But narrow and unreasonable interpretations of clauses in an insurance policy are not favored. They are prepared by the insurer, and if, with equal reason, open to two constructions, that most favorable to the insured will be adopted'. *Stipcich* vs. *Metropolitan L. I. Co.*, 277 U. S. 311, 72 L. Ed. 395.

"Forfeitures are not favored: 'The rule is that if policies of insurance contain inconsistent provisions or are so framed as to be fairly open to construction, that view should be adopted, if possible, which will sustain rather than *forfeit* the contract.' *McMaster* vs. *New York Life Insurance Co.*, 183 U. S. 25, 46 L. Ed. 64.

"However much the legal mind may differ as to the meaning of these provisions, the ordinary layman would construe them to mean that, in the event he became disabled before his premium fell due, his insurance would be continued until his disability was removed or *until his death*. That is the natural and reasonable construction to be placed upon the language used in this policy. Any other construction, to my mind, *would be contrary to the full purpose of*

*the contract and deprive the insured of one of the principal benefits of his policy. The right of the insured to have his premiums discontinued during disability is one that he had paid for.* To make its operation depend upon the *time of proof* of disability, and not *upon the time of disability itself*, which was the *real thing* that *he was protecting himself against, renders the provision of the policy under construction inoperative and the right of no value.*

"If the insured had died during the grace period of his policy, without the payment of the premium which fell due October 14th, no question would be raised as to the right of his beneficiary to recover. Why should a different rule be applied *when a disability during the grace period is sustained which renders him totally and permanently disabled?* To give the insured the full benefit of his policy, and carry out the intention which was doubtless in the minds of the contracting parties when the policy was written, his policy should not be allowed to forfeit where his disability occurs during the grace period of his policy and *continues until his death.* . . . Why so construe t his disability clause in insurance policies as to make it *worthless* in many cases? Death benefits are good for thirteen months, and are as of the *date* of death. Why should not the disability benefits be good for the same length of time, and begin as of the date of the disability? This is not an unreasonable and strained construction, and would be more in keeping, perhaps, with the representations made at the time of writing the insurance policy. The same measure of protection should be extended to the insured during the thirteenth month that he admittedly has during the other twelve months."

It will be observed that the only assumpsit in the *Marshall* case was:

"If the insured . . . before sixty and *while the policy is in full force* and effect, *without default* in the *payment of premiums* shall become totally and permanently disabled *and shall furnish satisfactory proofs* thereof, the company will waive the payment of the premiums thereafter becoming due, subject to the following conditions and provisions."

The foregoing conditions in the *Marshall* case are just as explicit as the conditions in Section 3 of the superadded conditions in the case at bar, as follows:

> "If before . . . sixty while the policy is in full force and effect, without default . . . shall furnish satisfactory proof thereof, the company will waive the payment of the premiums thereafter becoming due . . . subject to the following conditions and provisions".

Among other conditions in the *Marshall* policy are these benefits:

> "*Upon receipt of due proof* . . . the Company *will* waive the payment of all premiums *thereafter becoming due under the policy.*"

The judgment in the *Marshall* case was in favor of the insured and application for certiorari was refused by this court. 279 U. S. 851, 73 L. Ed. 994. Notwithstanding this fact, however, this decision in the *Marshall* case was the subject of comment and implied approval by this court in the subsequent case of *Bergholm* vs. *Insurance Company*, supra. It found no inconsistency between its conclusions in the *Bergholm* case and those of the Circuit Court of Appeals in the *Marshall* case, and so stated. In commenting thereon, Mr. Justice Sutherland in delivering the opinion of the court, said:

> "We granted certiorari because of a *supposed* conflict with *Minnesota Mutual Life Insurance Co.* vs. *Marshall*, 29 Fed. 2nd, 977";

And said of the policy in the *Bergholm* case:

> "In case of total and permanent disability there was a provision for payment of the monthly income for life . . . the policy expressly providing if any premium is not paid on the date when due, this policy shall cease and determine except as hereinafter provided. The income disability clause which follows this language provides 'Upon receipt by the company of . . . proof that the insured is . . . disabled as hereinafter defined, the company will:

> " '1. Pay . . . all premiums becoming due hereon after the receipt of such proof and during the continuance of the . . . disability.
>
> " '2. Pay the monthly income . . .
>
> " '3. . . . To entitle the insured to the above total and permanent disability benefits this policy at the time of making claim for such benefits must be in full force and all premiums becoming due prior to the time of making claim must have been duly paid.' "

It is needless to point out that no such express language as this is used in the case at bar, and there is no other language in the *Bergholm* policy in any way in conflict therewith. The court then refers to the petitioner's contention that the right to the disability benefits accrued at the time of the disability and thus distinguished the two:

> "In support of this contention, *Minnesota Mutual Life Insurance Co.* vs. *Marshall*, supra is cited. The pertinent provisions of the policy there, however, *differ from those found in the policy here under consideration.* There the policy provided that if the insured while the policy is in force and before default in payment of premiums, shall become totally and permanently disabled *and shall furnish satisfactory proof thereof*, the Company will waive the payment of premiums *thereafter becoming due*, and that upon the receipt of due proof of total and permanent disabilities, the Company will waive the payment of all premiums thereafter becoming due". The court held that the waiver took effect at the time of the disability, and did not depend upon the time when proof thereof was furnished.

It thus appears that the *Marshall* case had the same promise to waive *in futuro* and conditioned on furnishing satisfactory proof as is found here in the *added condition* only. The petitioners contend that the *Bergholm* case overruled or qualified the *Marshall* case. It did nothing of the kind. On the contrary Mr. Justice Sutherland, speaking for this Court, continued:

> *"We do not need to controvert this construction of the words quoted, or question the soundness of the view of the court that the existence of the disability before the premium became in arrears, standing alone, was enough to create the waiver. In that view, the obligation to furnish proof was no part of the condition precedent to the waiver: but such proof might be furnished within a reasonable time thereafter. Here the obligation of the company does not rest upon the existence of the disability; but it is the receipt by the company of proof of the disability which is definitely made a condition precedent to an assumption by it of payment of the premiums becoming due after the receipt of such proof. The provision to that effect is wholly free from the ambiguity which the court thought existed in the Marshall policy."*

And recognizing the principle which we are here applying, said:

> "It is true that where the terms of a policy are of doubtful meaning, that construction most favorable to the insured will be adopted. This canon of construction is both reasonable and just."

And again said:

> "That policy (the Marshall policy) did not *expressly* require any proof to be submitted *before default* . . . and while policy was in full force and effect. The Bergholm policy did. In the *Minnesota Life Insurance* case the fact of the existence of disability before default and not proof thereof was *the test of liability.* In the Bergholm case the test of liability is not existence of the disability, but also the making of proof thereof."

Not only is this the construction placed upon the similar policy in the *Marshall* case by the Circuit Court of Appeals and approved by this court in the *Bergholm* case, but it is the identical construction placed upon this policy itself by the company *after the death of the insured* and *after proof of disability had been submitted.* See R. p. 30, where in a letter addressed to the respondent by Thomas P. Morgan, Jr.,

Manager of the petitioner Company, he says, referring to the policy here in suit:

> "We quote herewith letter from the Home Office:
>
> "According to Home Office records, this policy lapsed for the non-payment of the premium due November 16, 1931.
>
> "We refer you to that part of the policy contract formerly held by Mr. Cooksey:
>
> " 'Supplementary Benefits to Section entitled Benefits in event of total and permanent disability before age 60'.
>
> "Benefits if premium in default not over six months—If not later than six months after the due date of any premium in default and provided no previously due premium is also in default, due proof is received by the company before the insured shall have attained the age of sixty years that the insured was totally and permanently disabled, as defined in the section entitled 'Benefits in event of total and permanent disability before age 60', at the date when such premium in default fell due, and has been continuously so disabled since said due date the policy will be reinstated without evidence of insurability and the waiver of premium and disability income benefits shall be the same as if such default had not occurred'.
>
> "As this policy *lapsed prior* to the date Mr. Cooksey *became disabled*, there is nothing to be considered."

The position then taken by this company as to the proper construction of this very policy is exactly the construction placed upon it by the respondent. Petitioners now concede that this policy was *not* in default prior to the day Mr. Cooksey became disabled. The construction then placed upon this policy by the company is wholly different from that now sought and is evidently the result of an after-thought.

The Circuit Court of Appeals in dealing with this policy lays stress upon its provisions in the present case:

> "If while no premium on this policy is in default the insured shall furnish to the company due proof

> that he is totally and permanently disabled" the company will "after receipt of such due proof waive payment of each premium as it thereafter becomes due during such disability,"

losing sight of the like provision in the *Marshall* case:

> "If the insured . . . before sixty and while the policy is in full force and effect without default in the payment of premiums shall become totally and permanently disabled, and *shall furnish satisfactory proof thereof*, the company will waive the payment of premiums *thereafter becoming due subject to the following conditions and provisions*,"

among others of which are the following benefits:

> "*Upon receipt of due proof* the company will waive payment of all premiums thereafter becoming due under the policy."

The Circuit Court of Appeals in attempting to distinguish this case from the *Marshall* case, says (R. p. 85).

> "The Circuit Court of Appeals for the Eighth Circuit which decided the *Marshall* case has itself distinguished the form of expression there employed to one very similar to that employed in the present case. See *Orr.* vs. *Mutual Life Insurance Co. of New York*, 64 F. 2d, 561."

It is difficult to see just how the learned justice who delivered the opinion of the court fell into this error. The policy in the *Orr* case is wholly different in language and purpose from that used in the *Marshall* case or in the present case. It was on a form in use more than ten years prior to the issuance of the policy here involved. The dispute was solely to *recover premiums* which had fallen due and which had been paid between April 27, 1925, and September 22, 1931, and distinguished the *Marshall* case from the case there at bar in the same particulars that we now distinguish it. We quote only such of the italicized portions with such of the unitalicized context as is necessary to show the connection and the material error of the court in this particular:

> "*When* such benefits take effect. *If the insured shall* before attaining . . . sixty . . . provided all past due premiums shall have been duly paid, *furnish due proof* to the Company at its home office . . ., *the company upon receipt and approval of such proof will grant the following benefits*:
>
> ". . . The company will . . . waive payment of each premium as it becomes due *commencing with the first premium due after approval of said due proof. Any premium due prior to such approval by the company must be paid in accordance with the terms of the policy.*" (Italics by the Court).

The Court commented: "There is no possible ambiguity in this language," and referring to the *Marshall* case, said:

> "The wording of the policy there involved is not the same as here and is far from being so clearly expressed. There this court deemed an ambiguity to exist and *properly* resolved the construction in favor of the insured."

It further appears from the report in the *Orr* case, page 563, et seq., that subsequent to the issuance of that policy new forms of policy "greatly liberalizing" their provisions were issued. We thus see that the policies as then issued accomplished clearly the purpose now asserted to be the intent of the policy at bar later adopted. If there was no purpose then to liberalize, why was the explicit language already used in the *Orr* case changed to the *ambiguous* and *contradictory* terms used in the policy at bar by the same company?

## EFFECT OF THE VIRGINIA STATUTORY PROVISIONS

**(b) Petitioner cannot defend for breach of condition.**

Even if the construction urged by respondent is not the proper construction of the language used independent of statutory provisions, the construction is mandatory under the provisions of Section 4228 of the Virginia Code:

> "In any action . . . on a policy of life insurance hereafter issued . . . to recover for the

> death of such person, it shall be no defense that the insured committed suicide . . .. Nor shall such policy be contestable for any cause after it shall have been in force during the life time of the insured one year from its date, except for non-payment of premiums and except for violation of the conditions of such policy requiring the payment of additional premium in the event of naval or military service in time of war . . ."

It cannot be contended that this is not an action on a policy of life insurance, nor that the ground of contest is the non-payment of premiums. It is submitted with equal confidence that both the death and disability benefits were within the coverage of this policy.

This section of the Virginia Code was construed by the Court of Appeals of Virginia in *U. S. S. L. I. & T. Co.* vs. *Massie*, first reported in 164 S. E. 529, and later on rehearing in 159 Va. 832, where both opinions are reported. In that case the insured applied for insurance stating the he was a lawyer, and among other things stipulated:

> "I hereby warrant and agree . . . if . . . I . . . at any time shall . . . personally engage . . . in service on any railway train . . . any agreement under this application shall thereupon become null and void." (159 Va. 827).

The policy was issued thereunder. The insured was killed on the 29th day of March, 1929, while acting as a conductor for a railroad company. There was a judgment for the insured in the lower court. On appeal the Virginia court first reversed the lower court upon the ground that breach of this condition forfeited the policy. After reargument on January 12, 1933, with all eight members of the court present, the court reversed its first decision in a very clear discussion of the questions by Justice Holt, and the judgment of the lower court was unanimously affirmed. The court said, 159 Va. 850:

> "It is perfectly plain that an insurance company is not liable for a loss not covered by its policy. To use an extreme illustration, if one were to die after the

expiration of a term policy there would be no liability, and a company which undertook to defeat an attempt to saddle upon it a loss would not be contesting it. To use another illustration, if it were to declare that death due to an accident in an airplane was not covered, there could be no liability for such a loss, and a denial of liability would not constitute a contest, but it is also plain that if liability were denied because of some *condition subsequent broken*, that would be a contest within the purview of Code Section 4228 as amended by Acts 1926 (c) 205," citing *Whitfield* vs. *Aetna Life Insurance Co.*, 205 U. S. 489, 501.

In discussing the application in that case, the Court said:

"It provides that if the insured shall personally engage 'in service on any railway train . . . any agreement under this application shall become null and void' ".

And on page 851, says:

"This rider was proposed to New York Life Insurance policies: 'death as the result of service, travel or flight . . . except as a fare paying passenger, is a risk not assumed under this policy . . . .'

"It will be observed that it deals with 'a risk not assumed'. Cardozo, C. J. in *Metropolitan Life Insurance Co.* vs. *Conway*, Superintendent of Insurance, 252 N. Y. 449, 169 N. E. 642, held this to be a valid rider provision, and said: 'The provisions (statutory) that a policy shall be incontestable after it has been in force during the lifetime of the insured for a period of two years *is not a mandate as to coverage*, a definition of the hazards to be borne by the insurer. It means only this, that within the limits of the coverage the policy shall stand, unaffected by any defense that it was invalid in its inception, or *thereafter became invalid by reason of a condition broken*' ".

The Virginia Court continued:

"Judge Cardozo, in commenting upon *Northwestern Mutual Life Insurance Co.* vs. *Johnson*, 254 U. S. 96, 65 L. Ed. 155, made this observation:

> " 'The clause there in question was not a limitation as to coverage. It was a provision for a forfeiture. In case of the suicide of the insured, whether sane or insane, the policy was to be void.' "

This is the exact condition here. The disability benefit and premium waiver provision was within the coverage of the policy and the result here, if the construction contended for by petitioner is correct, is a provision for a forfeiture of a policy for breach of a condition subsequent to the attaching of the liability by the occurrence of the event insured against. The Virginia court said:

> "Continuing, Cardozo, C. J. said: '. . . With such a clause the death of the insured, coupled with the payment of the premiums, will sustain a recovery in the face of a forfeiting condition. It is quite another thing to say that the same facts will prevail against a refusal to assume the risk'.

And continued, at page 852:

> "This sound distinction appears in many cases. Had the policy declared that 'death from suicide is a risk not assumed', a different conclusion would doubtless have been reached."

The court reversed its former decision and affirmed the original judgment. It cannot be denied that the risk of total disability occurring within the life of the policy was within the coverage of the insurance and that the effect here is to forfeit that coverage by reason of a subsequent forfeiting condition other than the non-payment of premiums.

It cannot be doubted that these provisions of the Virginia statute and the policy of Virginia in respect to these matters as manifested by its statutes and by the decisions of its courts, is controlling on the federal courts in passing upon insurance policies issued within the state. See *New York Life Insurance Co.* vs. *Cravens*, 178 U. S. 389, 44 L. Ed. 1116, 1122-23, where Mr. Justice McKenna said:

> "It is well settled that the legislature of the state has the power to pass laws regulating and prescribing rules by which foreign insurance companies may do business in this state, and to prohibit them from doing so altogether if inclined."

And again on page 1123 L. Ed., he said:

> "A policy in mutual life insurance, it is contended, is an interstate contract and the parties may choose its applicatory law. Instances under the law of usury . . . private international law are cited as examples. . . . But if such cases apply at all they necessarily have limitation in the policy of the state . . . . But the interests of the state must be deemed to be expressed in its laws. *The public policy of the state must be deemed to be authoritatively declared by its courts.* Their evidence we cannot oppose by speculations or views of our own. Nor can such interests and policy be changed by the contract of parties. Against them no intention will be inferred or be permitted to be enforced."

The court there applied the Missouri law to a contract made within Missouri though the policy itself declared it was to be governed by the New York law. The same principles are recognized and applied to insurance policies in *Equitable Life Assurance Society* vs. *Clements*, 140 U. S. 226, 35 L. Ed. 497, 500; *Mutual Life Insurance Co.* vs. *Illinois*, 193 U. S. 554; 48 L. Ed. 792; and *N. W. M. L. I. Co.* vs. *McCue* (a Virginia case), 223 U. S. 247, 56 L. Ed. 423, 424.

**(c) Sections 4315, 4315 (i) and 4317 of the Virginia Code Annotated deny petitioner the right to rely on this defense,**

1st, because a mere inspection of the policy shows that the exceptions relied on in Section 3 of Conditions to defeat the benefits offered under the face of the policy are not printed with the same prominence as the benefits to which they apply, but that these weasel words are printed in smaller type, and

2nd, because sub-section (i) of Section 4315 prohibits absolutely any provision that limits the term within which *proofs of claim* shall be furnished to the company to a period "less than 90 days from the date of death . . . *or from the termination of any other disability,*" and Section 4317 requires the policy to be construed as provided in said Section 4315.

The Virginia Supreme Court of Appeals has not had occasion to construe this particular section but has sustained similar provisions in respect to the minimum size that any restrictive provisions similar in purpose to this may be printed, saying in *Sulphur Mines Co.* vs. *Phoenix Insurance Co.*, 94 Va. 355, 359:

> "The object of the statute is a wise and beneficent one to protect applicants for insurance who are often times inexperienced and unacquainted with the provisions and stipulations usual in policies of insurance, by requiring that such conditions and restrictive provisions shall not constitute a defense unless they are *printed in the policy in type of a prescribed size.*"

And again:

> "If printed in small type these restrictive provisions might easily escape the observation of the unwary, and it has been therefore wisely ordered that they, and not the *policy*, shall be nugatory unless printed in type of such a size as would challenge the attention and be easily read by the ordinary man."

*Nat'l L. I. Ass'n* vs. *Berkley*, 96 Va. 543, *Eq. L. Ass'n* vs. *Wilson*, 110 Va. 571.

This statute carries this wise policy a step further and for the same reason that where a benefit is conferred by one clause of a policy, a restrictive clause shall be "printed with the same prominence as the benefits." That was not done with respect to the weasel worded provision here under consideration.

**(d) Physical and Mental Incapacity to Furnish Proofs of Loss Excuses Failure to Furnish Them**

The Circuit Court of Appeals was unquestionably correct in its conclusion that mental and physical inability to furnish proofs of disability excused the same and that there was ample evidence before the court to justify submitting that point to the jury.

There is some conflict of authority on this point, but as pointed out in the opinion of the Circuit Court of Appeals (R. p. 87) an overwhelming majority of the state courts that have passed upon this matter at all have laid down the rule that a condition requiring notice of proof of disability is excused by reason of the physical or mental incapacity of the insured, and this has been the ruling by the Supreme Court of Appeals of Virginia in *Swann* vs. *Atlantic Life Insurance Co.*, 156 Va. 852, 159 S. E. 192. Cases to the same effect in other jurisdictions are *Rhyne* vs. *Jefferson Standard Life Insurance Co.*, 196 N. C. 717, 147 S. E. 6, and 199 N. C. 419, 154 S. E. 749; *Levan* vs. *Metropolitan Life Insurance Co.*, 138 S. C. 253, 136 S. E. 304; *Roseberry* vs. *American Benev. Ass'n*, 142 Mo. Ap. 552, 121 S. W. 785; *Continental Casulaty Co.* vs. *Mathis*, 150 Ky. 447, 15 S. W. 507; *Comstock* vs. *Fraternal Assoc.*, 116 Wis. 382, 93 N. W. 22; *Reed* vs. *Loyal Protective Assoc.*, 154 Mich. 161, 117 N. W. 600; *Woodmen's Ass'n* vs. *Byars*, 62 Nebr. 673, 87 N. W. 646; *Pfeifer* vs. *Missouri S. L. I. Co.*, 174 Ark. 783, 297 S. W. 847, 54 A. L. R. 600; *North American Accident I. Co.* vs. *Watson*, 6 Ga. App. 193, 64 S. E. 693. And such was the holding of this court in *Insurance Company* vs. *Boykin*, 12 Wall. 433, 439, 20 L. Ed. 442, 444. The facts in that case are thus stated by the Court:

> "The insured having applied to the agent of the insurers to make out proof of the loss, an affidavit was made by him, in which, after giving the particulars of the loss, he proceeded further to state that he believed the building had been set on fire by an incendiary; that he had heard of repeated threats of a person, whom he named, that he would burn

> the premises and that it was in consequence of these threats that he had procured the insurance which he was then seeking to recover. When this affidavit was laid before the insurance companies, they refused to pay . . . Testimony was given to show that at the time Boykin made this affidavit he was insane, and also that it was procured from him by fraud.
>
> ". . . The defendants at the trial asked instructions, the substance of which is condensed in the proposition that they had a right to proof of loss by an intelligent being, and if plaintiff was insane no such proof had been given, and if he were sane then his affidavit showed such fraud as should defeat recovery. The last of these propositions is not denied".

And then the court concluded:

> "But the first is too repugnant to justice and humanity to merit serious consideration. There are two obvious answers to it. First, the affidavit, whether of an insane man or not, is sufficient in the information which it conveys of the time, the nature and amount of the loss. Second, *if he was so insane as to be incapable of making an intelligent statement, this would, of itself, excuse that condition of the policy*".

In a note to *New England Mutual Insurance Co.* vs. *Reynolds*, reported in 59 A. L. R. 1075, it is stated:

> "The overwhelming weight of authority is to the effect that the insured in policies requiring notice of the accident or disability within a stated time after occurrence thereof is excused for his failure to give such notice . . . if he is prevented from so doing by reason of mental incapacity resulting from accident or disability provided such notice is given a reasonable time after recovery."

We find, therefore, that the decision of the Circuit Court of Appeals on this point is in conformity with the ruling of this court in *Insurance Company* vs. *Boykin*, supra; in conformity with the Virginia statute on that subject Sections 4315 and 4317; in conformity with the decision

of the Court of Appeals in *Swann* case, 156 Va. 852, and with the overwhelming weight of authority against which is cited the decision of the Circuit Court of Appeals, Fifth Circuit, in the *Egan* case, 67 Fed. 2d, 899, which is based wholly upon the *Bergholm* case. So far as the report of the *Egan* case shows, the only provision in the policy involving the disability and premium waiver benefits, are as follows:

> "If after this policy shall have been in force one full year and before default in the payment of any premium, the *company receives due proof* that the insured before attaining the age of sixty years has become wholly disabled by bodily injury or disease so that he is and will be presumably thereby permanently and continuously prevented from engaging in any occupation whatsoever for remuneration or profit, the company shall waive payment of such premium as it thereafter becomes due during the insured's said disability".

In passing on the contention that since Egan was insane and personally unable to furnish proof he was excused therefrom, the Circuit Court of Appeals said:

> "This contention is untenable. The policy is plain and unambiguous. The contract plainly contemplates that, if for any reason the insured is unable to promptly make proof of his disability warranting the suspension of premiums and the payment of the annual instalments, someone else in interest must do so for him. This is a condition *precedent* necessary to be complied with to fix liability under the policy".

It is remarkable that though this language is thus construed in the *Egan* case to enable anyone to make the proof for an insane man, that in the case at bar and in dealing with the question of who might make the proof under the rider provision allowing such proof to be made six months after default, Judge Soper, held (R. p. 86) that the right thereunder to make proof within six months after default independent of mental incapacity "is *obviously* not intended to survive the death of the insured". In other words, in

the *Egan* case it was held because the policy did not specify who should make the proof that any person in interest could make it, whereas in this case, dealing with the primary right, Judge Soper held that because there was no specification as to who should make it that no one would be able to make it after the death of the insured, unless incapacitated from making it before and throughout the period of default.

The only condition *precedent* in this case was that stated in the face of the policy:

> "If the insured becomes . . . disabled . . . will pay $45.00 per month . . . besides waive premiums".

That condition, the one insured against, having occurred, the interest of the insured vested and was subject only to be defeated by breach of a *condition subsequent thereto.* In 12 C. J. 410, a condition subsequent is thus defined:

> "A condition which operates upon an estate already created and vested and renders it liable to be defeated or forfeited; one that, when it does or does not happen, is or is not performed, as the case may be, defeats the estate; a condition by the failure or non-performance of which an estate already vested may be defeated; a condition where an estate *or interest* is so given as to vest immediately, subject only to be divested by *some subsequent act or event;* one by which an interest already vested may be divested, or a *contingent interest defeated* before vested. In contract one which follows the performance of the contract and operates to defeat and annul it upon the subsequent failure of either party to comply with the conditions".

A condition subsequent is one to be performed or fulfilled after the vesting of the estate and the intent of which is to defeat it. 2 Minor 266. And it is well settled that conditions subsequent are not favored in law because they tend to destroy estates. *Potomac Power Co.* vs. *Burchell,* 109 Va. 676, 683.

> "Nothing is better settled than that in conditions subsequent, since they are in defeasance of interests

> already vested, courts of law and courts of equity are strict in requiring the very event or the act to be done, with all its particulars, which is to defeat the interest previously vested . . . As was said by Lord Alvanly, 5 Vesey Rep. 209, where there were clear words of gift, creating a vested interest, the court will never permit the absolute gift to be defeated, unless it be *perfectly clear* that the very case has happened in which it is declared that the interest shall not arise." *Lewis* vs. *Henry*, 28 Gratt. 192, 203. See also *New York Indians* vs. *U. S.*, 170 U. S. 1, 15, 42 L. Ed. 932, et seq.

The general rule on this subject is stated in 13 C. J. 642:

> "Where from the nature of the contract it is evident that the parties contracted on the basis of the *continued existence* of the person or thing, condition or state of things to which it relates, the *subsequent perishing of the person or thing or cessation of existence of the condition will excuse the performance*, a condition to such effect being implied, in spite of the fact that the *promise may have been unqualified.* The rule extends to a contract based on the assumed existence and continuance of a condition, or on the continuance of a subject-matter, which is not the direct object of the contract. It is necessary, however, that the existence of the person or thing or condition be the basis and foundation of the contract. Otherwise the death or destruction of the person or thing or the failure of the condition to continue will not discharge the parties. Or as the rule has been stated in different language: Where there is principal subjectmatter in the power of one of the parties and an accessory or subordinate benefit arising by contract out of its existence, the court will not in the absence of express words imply a term that the subjectmatter shall be kept in existence merely to provide the subordinate or accessory benefit to the other party." 13 C. J. 642, supported by a wealth of authority.

There was no beneficiary named in the policy who could make proof, the beneficiary being the insured, or his estate. Therefore, there was no one who could make proof during the life of the insured and the continuance of his incapacity, which

likewise incapacitated him from appointing an agent to make it for him.

Hence, even if the condition for proofs contemplated the continued existence or capacity of the insured and the furnishing of proofs during such existence and capacity, his death waived such proof "a condition to such effect being implied in spite of the fact that the promise may have been unqualified."

## V. CONCLUSION

It is respectfully submitted that the judgment of the lower court remanding this case for a new trial should be affirmed but with instructions that the entire case should be submitted to the jury on both points as to whether or not the insured was under physical disability prior to default in the payment of premium, as well as on the point of his physical and mental incapacity to furnish proofs of such disability.

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